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Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 37.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

DONALD M. PAINTEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

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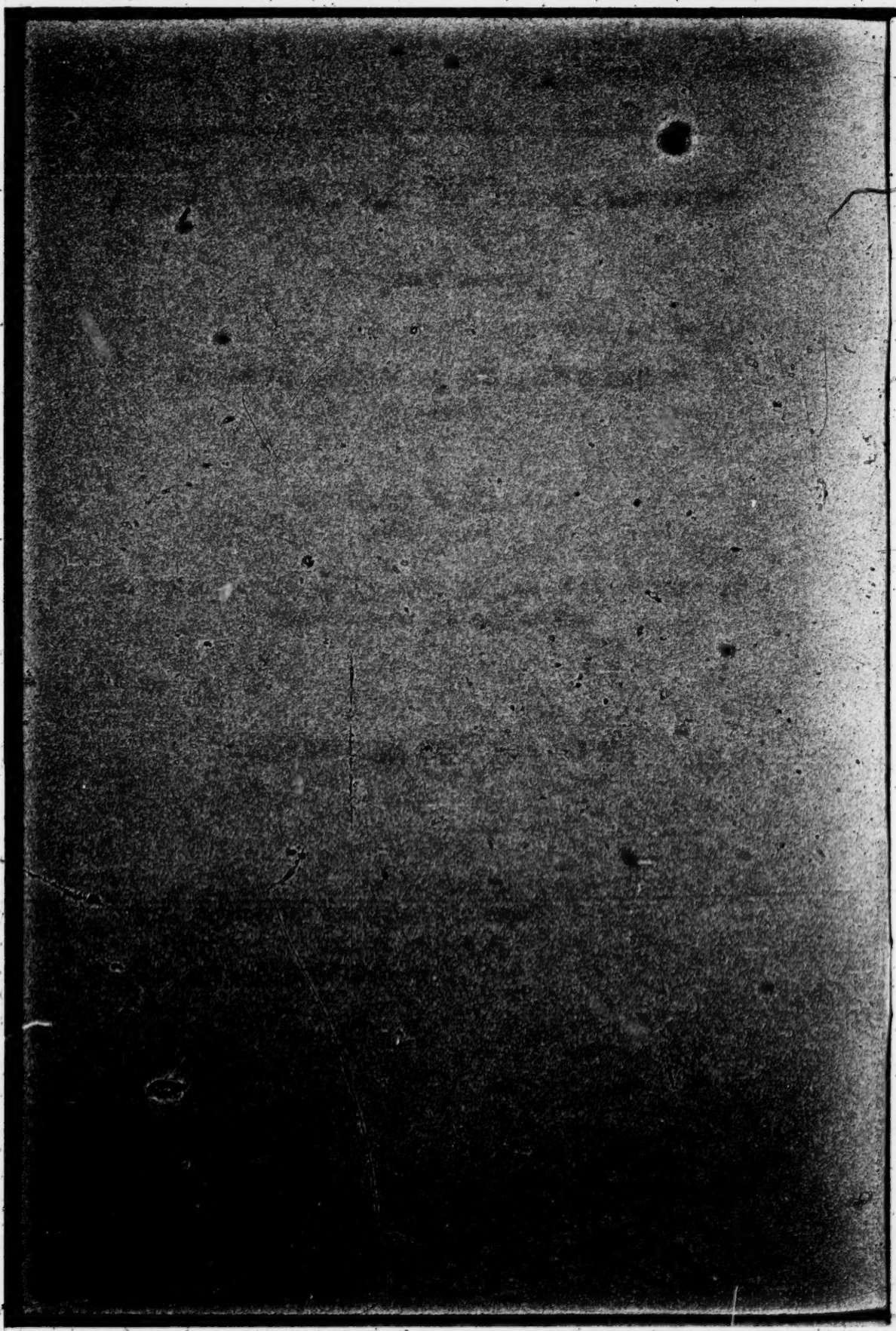

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BRIEF FOR THE RESPONDENT.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is reported at 252 F. Supp. 851, and the opinion of the United States Court of Appeals for the First Circuit, dated November 10, 1966, is reported at 368 F. 2d 142.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 10, 1966. The petition for certiorari was filed on January 3, 1967, and certiorari was granted on February 20, 1967. The

jurisdiction of this court is invoked under 28 U.S. Code, § 1254(1).

Constitutional Provisions and Statutes Involved.

1. Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Constitution of the United States, Amendment XIV:

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented.

1. Whether the evidence in the record is sufficient to support the finding that respondent was denied his constitutional right to be free of unreasonable searches and seizures where Boston police officers, having by chance en-

countered respondent in company with a known hoodlum companion and having a photograph of respondent but without information regarding his arrest or offense record, and with no reason to connect him with any of the crimes being investigated, set out to arrest and search the men in the hope evidence would develop.

2. Whether the District Court is correct in finding, and the Court of Appeals correct in relying upon the finding, that Boston police officers were without probable cause to arrest respondent when they went to his apartment to ask him questions and arrest him on suspicion of a loan-company holdup, and thereby deprived him of his constitutional rights by seizing material to be used against him at a subsequent trial.

3. Whether the District Court and Court of Appeals are correct in finding that, since Boston police officers had no probable cause to arrest respondent and did not obtain his consent to a search when they entered his apartment, they cannot validate their unlawful entry by reliance upon the discovery of a bag containing guns and ammunition which respondent had thrown from his window onto a fire-escape when faced with the officers' entry.

4. Whether the District Court and the Court of Appeals are correct in finding the manner in which the Boston police entered respondent's apartment, without any expression of purpose and absent consent by the respondent, and their seizure of incriminating material from the fire-escape and from the apartment, the material thereafter used against respondent at his trial, constituted a denial of respondent's rights under the Fourth and Fourteenth Amendments, requiring the state court judgment of conviction to be vacated.

Statement of Facts.

A. Introductory Summary.

Respondent was brought to trial before a jury in 1958 on the charge of armed robbery and related offenses, and convicted. At his trial in the state court, guns, ammunition, and serial numbers obtained from dollar bills were among the most incriminating evidence. These had been seized by Boston police officers who had entered respondent's apartment one evening, without a warrant, and engaged in a search. The extent of cause for the entry and search, which is the subject of this statement and this case, may be summarized by petitioner's principal witness, a police officer, whose testimony was quoted in the opinion of the Court of Appeals: ". . . In that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes" (R. 63).

B. Source of Alleged Suspicion: Association with a Hoodlum, a Liquor Store, a Police Photograph and Black Soft Hats.

On or about March 1, 1958, in the evening, two plainclothes officers of the Boston Police Department, McNamara and Maxwell, were travelling in an unmarked police car through the South End, one of the more depressed areas of the city. Directly in front of the officers at one point was a sedan with respondent and one Ash in the front seat. The officers stopped behind this car at a traffic signal. The first car, containing respondent and Ash, resumed its movement and came to a stop beside a liquor store. Respondent left the car and entered the store. Officer McNamara observed a similarity between respondent

and a police photograph the officer happened to have on his person. The officer had routinely taken the photograph from a desk at headquarters, adding it to others carried in his pockets (R. 24, 25).

At the time McNamara did not have respondent under suspicion for any crime (R. 30, 31). The officer knew nothing of respondent's police record, but assumed from the existence of the police photograph that respondent had been involved with the law (R. 33). Ash, the driver of the vehicle from which respondent had emerged, was known to the officer for robbery and for having been in prison (R. 26). Because of a number of liquor-store robberies, these officers watched the automobile as respondent emerged and as it moved away from its position in front of the store (R. 26, 25). Neither Ash nor respondent was then sought by police, nor were they the objects of specific suspicion (R. 30). When asked what aroused his suspicion when he observed respondent and Ash in the car McNamara had replied: "Well, our routine function is to be on the lookout for a rash of liquor store holdups at the time, and other holdups at the time. Both men seated in the car were wearing black soft hats. To me it did not look right. As a result, I figured I would give them a little surveillance" (R. 24).

C. The Decision to Make the Arrest, and Positioning of Officers to Rear of Building.

Ash recognized the police officers and fled in his automobile. The officers gave chase and apprehended Ash. The officer told him to get out of the car. "He did. I asked him, we could talk to each other, if we met in the street, what did he take off for? He stated, 'You scared me' " (R. 25). After a brief period of questioning and an

examination of his car he was released. The police followed him back to the neighborhood of the liquor store (R. 25, 26). The officer inquired of the liquor-store clerk, who replied that respondent had purchased some liquor, and lived a few doorways distant. McNamara testified that, when he first saw them, and saw Painten going in the liquor store, "I felt this might be a liquor store holdup. The situation changed. Shortly after, when Ash panicked and gave us a chase around the South End, and now we have them together in the apartment and the holdup of the loan company is in my mind now, since there is no liquor store holdup, and I find out he is living there, these things in my mind lead me to arrest him for that holdup" (R. 35). Officer McNamara then went to the building designated as the location of respondent's apartment. Respondent's name was on the mailbox at the door (R. 31).

McNamara called for another team of police, and on their arrival told one of them: "We are going up to see some fellows in an apartment, if we can find them, will you watch the back of the building?" (R. 27). The District Court in its opinion observed: ". . . The calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview" (R. 55).

McNamara and his fellow officers entered the building and went up to respondent's apartment. "All that he knew when he knocked on Painten's door was that Painten had some sort of record and that he had seen Painten in a car with Ash who he knew had a record for holdups" (R. 55). When asked what gave him reason to decide to enter the Painten apartment without a warrant the officer had replied: "Well, in that household, it has people with a background, people that I knew were in there, I might

be able to solve a string of serious crimes" (R. 32). At this point in the court testimony the officer had admitted that he had no information from anyone connecting respondent with any holdups (R. 33). He had admitted that he did not know respondent's police record (R. 33). Asked "So at no time did you ever have a case involving Mr. Painten for robbery or armed robbery?" McNamara's reply was: "I don't believe I ever had him for another crime" (R. 33).

D. THE ENTRY: "I SAID 'POLICE OFFICERS' . . . I HAD MY BADGE IN MY HAND." THE SEARCH: "I PUT MY HAND IN [ASH'S] POCKET . . . RUFO . . . BROUGHT THE BAG BACK IN THE WINDOW."

McNamara and his fellow officer had made no effort to seek a warrant to enter the house (R. 32). At respondent's door they knocked and identified themselves as police officers. Painten opened the door a few inches and looked at the officers. He asked the officers to wait, and closed the door. The police then heard a window of the apartment open and close. The door was then opened. The officer testified: "we were allowed to enter" (R. 27). Respondent testified: ". . . . as I opened the door, three officers pushed by me right into my apartment and pushed me right along with them" (R. 16).

Upon entering the apartment McNamara noticed the presence of Ash, who had earlier been questioned on the street, and respondent. There was a woman present. The officer noticed a bulge in Ash's pocket and immediately put his hand in the pocket, withdrawing a handful of money (R. 27). When the officer then went to the window to tell the others in back of the building to come up, one of them shouted that an object had been thrown from the

window (R. 28). One of these officers came from the back yard and entered the front of the building and then passed through the apartment. He climbed through a window above the fire-escape and retrieved a brown paper bag. In the apartment the bag was opened and found to contain two pistols and ammunition (R. 28).

McNamara then told respondent and the others that they were under arrest for "suspicion of a holdup on a loan company" (R. 28). The officer then searched the apartment, finding money and a box of bullets.

During the District Court hearing the officer at one point testified that his decision to arrest Painten had resulted from his observation of Ash and Painten together and his knowledge that there had been a recent holdup of a loan company (R. 35). A moment later he then stated that the discovery of the guns on the fire-escape had given him reason to make the arrest (R. 35). Having heard all the testimony of petitioner's police officers, and testimony of respondent, and having examined the stenographic transcript and entire record from the state court trial, the District Court found: ". . . The officers went to the apartment intending to ask Painten a few questions and then to arrest him 'on suspicion of the loan company job' " (R. 55).

The Court of Appeals found: "It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth Amendment makes unlawful" (R. 64).

At respondent's trial the material seized on the fire-escape and in his apartment was introduced into evidence, contributing measurably to his conviction.

Respondent sought a writ of error in the state court raising these matters and others, and the writ was denied. He then filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts. The writ was granted. *Painten v. Commonwealth*, 252 F. Supp. 851 (D.C. Mass. 1966). The state appealed. The United States Court of Appeals for the First Circuit affirmed the judgment of the District Court. *Massachusetts* v. *Painten*, 368 F. 2d 142 (1st Cir. 1966). This court granted certiorari on February 20, 1967.

Argument.

I.

The Totality of Circumstances Apparent from the Record Shows the Warrantless and Groundless Entry and Search by the Police were Contrary to the Provisions of the Fourth Amendment.

1. Lacking a warrant, the police were without probable cause to make the entry, search and arrest.

> "Officer McNamara did not have probable cause to arrest Painten when he went to Painten's apartment and sought entrance thereto . . . the entrance into Painten's apartment without a warrant and absent any probable cause to arrest any occupant thereof was 'under color of their police authority' and there was 'no valid basis in law for the intrusion.'
>
> "It is apparent that the police, knowing of a crime and knowing that Ash and petitioner were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop. It is precisely such tactics that the Fourth

Amendment makes unlawful." Opinion of Court of Appeals. (R. 64.)

The record amply supports the findings of the District Court and the Court of Appeals. The government's own police officer, testifying at the District Court, clearly establishes the factual situation at the time (R. 32, 33). Police officer McNamara made the decision to enter Painten's apartment and make the arrest (R. 35). It is evident from this officer's own testimony in the District Court that he had no substantial basis for suspecting the respondent as being involved in any crime then under investigation. What trace of suspicion did exist consisted of matters that at best could arouse interest on the part of the police, but only to the extent that such matters could later be part of a total picture of substance. Here the officer's suspicions were short of the substantial.

"I observed Mr. Painten in the vicinity of a cafe on Columbus Avenue, standing outside, inside of the bar many times and in the vicinity of the South End, and in company with other people whom I did know." (R. 33.)

"He had a record . . . What it was, I don't know. I don't recall, but I know he had one because I had a photograph in my pocket, taken at police headquarters." (R. 33.)

"I knew of the description of the men in the holdup, as a result of information received on our daily manifold. As I recall, they fitted the description, two white men, one tall, one a little shorter." (R. 30.)

"Ash's actions . . . XQ. . . . you mean fleeing the scene where you approached his vehicle? A. That is correct." (R. 32.)

This was noted by the District Court.

> "McNamara had no information connecting them with the loan company holdup or, for that matter, with any other crime; he had not set out on patrol with Painten or Ash particularly in mind as suspects; on the contrary, his suspicions focused on them only when they crossed his path. McNamara felt that Ash was a likely suspect for the loan company holdup because he had been convicted of holdups in the past and that Painten was a likely suspect because he had a record, though McNamara did not know what it was. McNamara had seen Painten in the company of men that he knew from police work. The only description of the holdup men which McNamara had available was that they were 'two white men, one tall, one a little shorter.' As officer McNamara candidly admitted, there were 'plenty of other fellows around the South End that could possibly have gone into the same category' as Painten and Ash if they had come across his path." (R. 52.)

Prior to the entry into respondent's apartment nothing was added to the grounds for suspicion. There is little doubt that the primary reason for the entry was purely exploratory. As the state's own witness expressed it: "Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes" (R. 32). When asked what information he had received that respondent had been involved in any holdups before that time, McNamara had replied: "I had no information from anyone" (R. 33).

With no more than what has been reviewed above, the officer decided to enter and make the arrest (R. 35). The

purpose was made clear by testimony from the principal officer. Without grounds to make an arrest on the street, the officers hoped the entry would reveal the necessary evidence (R. 64).

> "Their grounds for suspicion did not, even remotely, amount to probable cause for arresting either Ash or petitioner, either for the holdup or for any other crime." Opinion of Court of Appeals (R. 62).

This entry by the police under color of their authority was unlawful. This was a warrantless and groundless intrusion upon respondent's right of privacy and upon his right to protection from such police behavior. *Johnson* v. *United States,* 333 U.S. 10 (1948). *Mapp* v. *Ohio,* 367 U.S. 643 (1961). Where there was no justification for the entry the search conducted thereafter was not constitutionally acceptable. *Johnson* v. *United States* (*supra*).

2. Respondent did not consent to a search.

The police, upon arriving at the door of respondent's apartment, did not at any time state their purpose. There was no request to talk. This is found by the Court of Appeals, and the officer's testimony supports this finding.

> "I rapped on the door, and a voice said, 'Who is it?' I said, 'Police officers.' The door opened about three inches, and Mr. Painten looked out at me. He saw us. I had my badge in my hand. He said, 'Will you wait a minute?' I said, 'Sure.' " (R. 27.) (R. 62.)

The record of testimony in the District Court shows that there was no remark addressed to the purpose of the of-

ficers' visit (R. 27). Although the question of consent to an entry is a preliminary question of fact at the trial level, it has been held that such consent is not to be lightly inferred. *United States v. Como,* 340 F. 2d 891 (3d Cir. 1965). Even if there had been an invitation to "come in," that would not be enough to waive the constitutional right against search. Some consent to the search itself must be given. *Judd* v. *United States,* 190 F. 2d 649 (D.C. Cir. 1951). *United States* v. *Evans,* 194 F. Supp. 90 (D.C. D.C. 1961). In *Judd* and *Evans* the defendant merely allowed the officers to enter. The search which followed was found illegal. In *Davis* v. *People of the State of California,* 341 F. 2d 982 (9th Cir. 1965), the defendant stated: "If you want to, come in and look around." The search was found legal because there was consent. The respondent in the case at bar testified at the hearing in the District Court that he did not consent to the entry by the officers.

> ". . . I opened the door and as I opened the door, three officers pushed by me right into my apartment and pushed me right along with them." (R. 15-16.)

Having no knowledge of the purpose of the police, the respondent did open the door. At no time did the police request permission to conduct a search (R. 33). Although there had been no cause to enter and no consent to the entry or search, the officer immediately proceeded to explore the trouser pocket of respondent's companion, Ash (R. 27). No reason developed to support an arrest at this time. The search continued when an officer passed through respondent's apartment and went through the window to take the bag dropped earlier onto the fire-escape. The search was pursued without respondent's consent and was unlawful. *Johnson* v. *United States,* 333 U.S. 10 (1948).

The search by the officers was not within that category of validity encompassed by *Chapman* v. *United States,* 346 F. 2d 383 (9th Cir. 1965), or by *Robbins* v. *MacKenzie,* 364 F. 2d 45 (1st Cir. 1966). These cases cited resulted from situations where the officers were admitted without consent being given to search. However, within plain view there were articles of stolen property recognized by the officers without need to remove coverings, wrappings, containers or any obstruction to visual identification. These cases are clearly distinguishable from respondent's situation. Nothing incriminating was within plain view of the police. The conduct of the police as revealed in the record shows the purpose of the entry was to search.

3. The finding of the federal courts below that the police entered without probable cause and to make an arrest and search is amply supported by the record without reliance solely on testimony regarding the officer's intentions.

Petitioner has emphasized that the Court of Appeals found the entry, search and arrest by the police unlawful, relying on "the private hopes or thoughts of the officers involved" (Br. 7). An examination of the record does not support either this conclusion or the type of case to which the petitioner's brief on this subject is directed. Massachusetts decisions cited concern those cases where the officers had reason to connect the suspect with a crime (Br. 7). It is difficult to see the materiality of petitioner's observations, such as: "What a police officer does is more important than what he thinks" and "If the courts are to attempt to decide a case based solely on the thinking of the police . . ." (R. 8). The District Court and the Court of Appeals had testimony and a record that supported the findings without those courts ignoring the ac-

tions of the police and without their deciding solely on the basis of the thinking of the police. The principal officer testifying for the petitioner stated that he had no knowledge of the respondent's record of offenses beyond the assumption of some history which would have caused the police department to have the photograph (R. 33). He testified that he had not received any information that respondent had been involved in holdups (R. 33). The District Court observed: "I likewise have in mind that the calling of additional officers by radio and the placing of officers to guard both front and rear exits of the apartment building is far more indicative of a planned arrest than of an intended interview" (R. 55). It is unlikely that the grounds for arrest, or for an entry and search without a warrant, can be the subject of inquiry unless the police testimony regarding their sources of suspicion is given due regard. There is no reason to minimize testimony from a principal officer that he had no information connecting a suspect with a crime, or that the officer planned the entry, search and arrest for exploratory purposes. In the present case the manner in which the entry, search and seizure of property were executed, as described by the officer and by respondent, speak for themselves. These are not matters which were found only in the "private hopes or thoughts of the officers . . ." These circumstances were described in competent testimony of eyewitnesses, and no basis exists to say that the two courts below were in error to consider such testimony.

The opinions of the courts below show that officer McNamara's testimony was but part of the picture of events. There is no reason to consider all or part of this testimony irrelevant if it bears on the issue before the courts.

4. The findings and rulings of the courts below are within the established area of proving the reasonableness

and constitutional validity of entries, searches and arrests, and no novel departure appears in their opinions.

There is no mandate of disastrous proportions in the decision of the Court of Appeals. Petitioner puts forward this warning: "If the decision of the Court of Appeals is allowed to stand, it will become a dangerous and far-reaching precedent for all law-enforcement officials" (Br. 9). The Court of Appeals had before it the transcript of proceedings in the District Court. Throughout the testimony there are questions and answers bearing directly upon the grounds for the decision to arrest, and for the entry and search. The actions of the officers and the reasons for these actions, as expressed candidly by the principal officer involved, amply support the findings and conclusions of the courts. There is no unusual dependence upon the mental processes of that officer. There is no departure from the ordinary manner of weighing eye-witness testimony and drawing reasonable conclusions therefrom.

Petitioner argues the difficulty presented by the courts below in the light of *Cutchlow* v. *United States,* 301 F. 2d 295 (9th Cir. 1962) (Br. 10-11). The police were justified in *Cutchlow,* having a warrant for the arrest of one person on the premises and a detention warrant for the defendant. To prevent the escape of those persons the police had good reason to surround the house. There was no unlawful entry, since the warrants were for people believed to be on the premises. In respondent's case we do not have the *Cutchlow* situation. The purpose of the police in the latter is clear. The court there was not confronted with the question of why the police went to the house. In respondent's case the purpose of the police was not explained by warrants. Competent testimony on the subject was properly considered.

II.

The Entry of the Police, Without a Warrant and Without Probable Cause, was Not Made Valid by their Recovery of the Bag Containing Weapons Dropped from Respondent's Window to the Fire-Escape.

1. The dropping of the bag from respondent's window to the fire-escape below was the result of the unlawful intrusion by the police, and not voluntary.

The police approached respondent's apartment door to enter, search and make arrests. Their entry was unlawful. It was as a result of their presence at the door that respondent dropped the bag of weapons and ammunition from his apartment window to the fire-escape. This was not a voluntary act, nor was it an abandonment of the property. *Hobson* v. *United States,* 226 F. 2d 890 (8th Cir. 1955). There are no features concerning *Hobson* that render it inapplicable to the case at bar. Petitioner's contention that the forcible entry in *Hobson* distinguishes that case from this on the question of voluntariness is without validity, since the forcible entry of *Hobson* came after the throwing, and the entry could not have caused the act.

The property taken in the bag from the fire-escape was not abandoned. This was not a case of the tenant discarding property. Here the court could not say: "He had thrown them away. So far as he was concerned, they were *bona vacantia.*" *Abel* v. *United States,* 362 U.S. 217, 240 (1960). There is no reasonable basis on which it may be assumed that respondent hurriedly dropped two guns onto the fire-escape outside and below his window with the intention of discarding them. The fire-escape was not so distant and not so inaccessible that respondent considered

the bag with the guns to be relinquished beyond his control. *Work* v. *United States,* 243 F. 2d 660 (D.C. Cir. 1957). *United States* v. *Blank,* 251 F. Supp. 166 (N.D. Ohio, 1966). The government had no right to appropriate the property on the ground that it had been abandoned by respondent.

2. The unlawful entry, search and arrest cannot be rehabilitated by the fruits of the search.

By climbing through respondent's apartment window onto a fire-escape and recovering therefrom a paper bag which on later examination in the apartment was discovered to contain guns and ammunition, the police did not make their initial intrusion lawful. The search was not made legal by what it turned up. *Wong Sun* v. *United States,* 371 U.S. 471 (1963). *Johnson* v. *United States,* 333 U.S. 10 (1948). *Henry* v. *United States,* 361 U.S. 98 (1959).

Conclusion.

The record now before the court amply supports the finding of the District Court and the Court of Appeals that ". . . the police, knowing of a crime and knowing that [respondent and his companion, Ash,] were suspicious characters, but having no reason to connect them with the crime they were investigating, set out to arrest and search the men in the hope that evidence would develop" (R. 64). Contrary to petitioner's view of the case, those courts did not rely solely upon what were the hopes and the thoughts of the police.

Testimony was taken in the District Court, and respondent and the petitioner's principal police officer were examined thoroughly by both sides. The testimony regarding

the officer's lack of information connecting respondent to any crime, the officer's assumption of a police record based on the existence of a police photograph, and the calling of additional officers to be posted about respondent's building, all pointed to the reason for their intrusion upon respondent's premises.

The purpose of the entry of respondent's apartment was revealed by testimony of the principal officer. Although the police had no information connecting either respondent or his companion Ash with any specific crime (R. 33, 34), they engaged in an entry after calling for additional police to surround the building. The officer testified that the entry was to make an arrest (R. 35). Yet the officer explained his purpose in making the entry and arrest when he stated: "Well, in that household, it has people with a background, people that I knew were in there, I might be able to solve a string of serious crimes" (R. 32). No warrant existed for any of the persons in the apartment. The testimony of the officer substantially supports the finding that there were no grounds to make an arrest and the entry was sought to search for such grounds. No evidence was introduced at the District Court hearing to make such a finding unreasonable or unwarranted.

The entry of the police, lacking probable cause and lacking a warrant, was unlawful, and the recovery of a package containing guns from a fire-escape did not make the entry valid. The package was taken from the fire-escape as part of the unlawful search. The bag of guns was not abandoned by respondent but was dropped to the fire-escape during respondent's initial alarm at the arrival of police at his door. The police had no right to seize these weapons.

The testimony at the hearing before the District Court, reviewed before the Court of Appeals, amply supports their decision to vacate the state-court judgment and order a new trial. The description of the police procedures in this case, as explained by the petitioner's own officer, gave reason for the Court of Appeals to observe: "It is precisely such tactics that the Fourth Amendment makes unlawful" (R. 64).

Respondent respectfully submits that the judgment below should be affirmed, and that such action will not introduce a departure from established principles in the law.

Respectfully submitted,

LOUIS M. NORDLINGER.

On the brief:

Law students of the work-study
program of the Boston Y.M.C.A.
and Voluntary Defenders Committee, Inc.,
of Boston.